The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff,

v.

ANH T. NGUYEN, Defendant.

NO. CR10-329JLR

GOVERNMENT'S PROPOSED FINAL JURY INSTRUCTIONS

(Cited)

DATED: July 21, 2011

Respectfully submitted,

JENNY A. DURKAN
United States Attorney

s/Thomas M. Woods
THOMAS M. WOODS
SUNNI Y. KO
United States Attorney's Office
700 Stewart Street, Suite 5220
Assistant United States Attorney
Phone: 206-553-4312
Fax: 206-553-6934
E-mail: thomas.woods2@usdoj.gov

PROPOSED INSTRUCTION NO. 1

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult.

It is your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law and must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all these instructions and not single out some and ignore others; they are all important. Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

Ninth Circuit Model Instruction 3.1.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 2

The indictment is not evidence. The defendant has pleaded not guilty to the charges. The defendant is presumed to be innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant does not have to testify or present any evidence to prove innocence. The government has the burden of proving every element of the charges beyond a reasonable doubt.

Ninth Circuit Model Instruction 3.2.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 3

[If the defendant does not testify]

A defendant in a criminal case has a constitutional right not to testify. You may not draw any inference of any kind from the fact that the defendant did not testify.

Ninth Circuit Model Instruction 3.3.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 4

[If the defendant testifies]

The defendant has testified. You should treat this testimony just as you would the testimony of any other witness.

Ninth Circuit Model Instruction 3.4.

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Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 5

Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Ninth Circuit Model Instruction 3.5.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 6

The evidence you are to consider in deciding what the facts are consists of:

(1) the sworn testimony of any witness; and

(2) the exhibits received in evidence; and

(3) any facts to which the parties have agreed.

Ninth Circuit Model Instruction 3.6.

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Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 7

In reaching your verdict you may consider only the testimony and exhibits received in evidence. The following things are not evidence and you may not consider them in deciding what the facts are:

1. Questions, statements, objections, and arguments by the lawyers are not evidence. The lawyers are not witnesses. Although you must consider a lawyer's questions to understand the answers of a witness, the lawyer's questions are not evidence. Similarly, what the lawyers have said in their opening statements, will say in their closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.

2. Any testimony that I have excluded, stricken, or instructed you to disregard is not evidence.

3. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Ninth Circuit Model Instruction 3.7.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 8

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which you can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Ninth Circuit Model Instruction 3.8.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 9

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the witness's opportunity and ability to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

(6) whether other evidence contradicted the witness's testimony;

(7) the reasonableness of the witness's testimony in light of all the evidence; and

(8) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

Ninth Circuit Model Instruction 3.9.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 10

You are here only to determine whether the defendant is guilty or not guilty of the charges in the indictment. The defendant is not on trial for any conduct or offense not charged in the indictment.

Ninth Circuit Model Instruction 3.10.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 11

A separate crime is charged against the defendant in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count

Ninth Circuit Model Instruction 3.11.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 12

The Vietnamese language has been used during this trial.

The evidence you are to consider is only that provided through the official court interpreter and translator. Although some of you may know the Vietnamese language, it is important that all jurors consider the same evidence. Therefore, you must accept the evidence presented in the English interpretation or translation and disregard any different meaning.

Ninth Circuit Model Instruction 3.19.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 13

You have heard testimony that the defendant made a statement. It is for you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to give to it. In making those decisions, you should consider all the evidence about the statement, including the circumstances under which the defendant may have made it.

Ninth Circuit Model Instruction 4.1.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 14

You have heard testimony from an undercover investigator who was involved in the government's investigation in this case. Law enforcement officials may engage in stealth and deception, such as the use of undercover agents, in order to investigate criminal activities. Undercover agents may use false names and appearances and assume the roles of members in criminal organizations.

Ninth Circuit Model Instruction 4.10 (modified).

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 15

During the trial, certain charts and summaries were shown to you in order to help explain the evidence in the case. These charts and summaries were not admitted in evidence and will not go into the jury room with you. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

Ninth Circuit Model Instruction 4.15.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 16

The defendant is charged in Counts 1-3 of the Indictment with wire fraud in violation of Section 1343 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly participated in a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises;

Second, the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;

Third, the defendant acted with the intent to defraud; that is, the intent to deceive or cheat; and

Fourth, the defendant transmitted or caused to be transmitted by wire some communication in interstate commerce to help carry out an essential part of the scheme to defraud.

The following chart references the date of each alleged act of wire fraud for Counts 1-3. You may refer to this chart during your deliberations.

Count	**Date**	**Sender**	**Wire Transmission**
1	October 7, 2008	Hop Thanh	SNAP benefit EBT transaction involving card XXXXXXXXXXXX5176 for $398.00 from the State of Washington to the State of Wisconsin
2	June 11, 2009	Hop Thanh	SNAP benefit EBT transactions involving card XXXXXXXXXXXX3720 for $500.00 from the State of Washington to the State of Wisconsin
3	June 3, 2010	Hop Thanh	SNAP benefit EBT transaction involving card XXXXXXXXXXXX3720 for $300.22 from the State of Washington to the State of Wisconsin

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(206) 553-7970

Ninth Circuit Model Instruction 8.121 (mail fraud) (modified); *United States v. Jenkins*, 633 F.3d 788, 804 (9th Cir. 2011) (wire fraud elements); Eleventh Circuit Model Instruction OI 51 (2010) (modified).

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 17

A communication from an EBT terminal in one state to a computer in another state constitutes a wire communication in interstate commerce.

2A Federal Jury Practice and Instructions § 47.08 (5th edition) (modified); Third Circuit Model Instruction 6.18.1343-1 (modified); Seven Circuit Model Instruction 1343.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 18

The government need not prove that the defendant actually used a wire communication in interstate commerce or that the defendant even intended that anything be transmitted in interstate commerce by means of a wire to help carry out the scheme or plan to defraud. The government must prove beyond a reasonable doubt, however, that a transmission by a wire in interstate commerce was, in fact, used in some manner to help carry out the scheme to defraud.

The government must also prove that the use of the wire in interstate commerce would follow in the ordinary course of business or events or that the use of the wire in interstate commerce by someone was reasonably foreseeable. However, the government does not have to prove that the defendant knew that the wire communication was of an interstate nature.

It is not necessary for the government to prove that the information transmitted by wire itself was false or fraudulent or contained any false or fraudulent pretense, representation, or promise, or contained any request for money or thing of value. The government must prove beyond a reasonable doubt, however, that the use of the wire helped carry out, in some way, the scheme or plan to defraud.

2A Federal Jury Practice and Instructions § 47.08 (5th edition) (modified); Seven Circuit Model Instruction 1343[5]; *United States v. Blackmon*, 839 F.2d 900, 907 (2d Cir.1988) (conviction for violation of wire fraud statute does not require knowledge of the interstate nature of the calls made); *United States v. Bryant*, 766 F.2d 370, 375 (8th Cir.1985) (same).

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 19

The words "scheme" and "plan" for purposes of the wire fraud statute mean any deliberate plan of action or course of conduct by which someone intends to deceive or to cheat another, or by which someone intends to deprive another of something of value.

A "false" or "fraudulent" statement or representation means a statement or an assertion which concerns a material or important fact or a material or important aspect of the matter in question and that was either known to be untrue at the time that it was made or used, or that was made or used with reckless indifference as to whether it was, in fact, true or false, and made or used with the intent to defraud. A material fact is a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction.

2A Federal Jury Practice and Instructions § 47.08 (5th edition) (modified); *United States v. Cloud*, 872 F.2d 846, 850 (9th Cir. 1989); *United States v. Serlin*, 538 F.2d 737, 748 (7th Cir. 1976); *United States v. Federbush*, 625 F.2d 246, 255 (9th Cir. 1980); *United States v. Kato*, 878 F.2d 267, 268 (9th Cir. 1989).

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 20

An intent to defraud is an intent to deceive or cheat.

You may consider whether a defendant had an honest, good faith belief in the truth of the specific misrepresentations alleged in the indictment in determining whether or not the defendant acted with intent to defraud. However, a defendant's belief that the victims of the fraud will be paid in the future or will sustain no economic loss is no defense to the crime.

Ninth Circuit Model Instruction 3.16; *United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993).

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 21

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. For the wire fraud counts only, the government is not required to prove that the defendant knew that her acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Ninth Circuit Model Instruction No. 5.6.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 22

If you decide that the defendant was a member of a scheme to defraud and that the defendant had the intent to defraud, the defendant may be responsible for other co-schemers' actions during the course of and in furtherance of the scheme, even if the defendant did not know what they said or did.

For the defendant to be guilty of an offense committed by a co-schemer in furtherance of the scheme, the offense must be one that the defendant could reasonably foresee as a necessary and natural consequence of the scheme to defraud.

Ninth Circuit Model Instruction 8.122.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 23

Each transmission by wire to help carry out the scheme or plan to defraud is a separate violation of the wire fraud statute.

2A Federal Jury Practice and Instructions § 47.15 (5th edition) (modified).

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 24

The defendant is charged in Counts 4-12 of the Indictment with food stamp fraud in violation of Section 2024(c) of Title 7 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant presented, or caused to be presented, food stamps for payment or redemption;

Second, the food stamps were received, transferred, or used in a manner not authorized by law or by the Department of Agriculture regulations;

Third, the defendant knew the food stamps were received, transferred, or used in a manner not authorized by law or by the Department of Agriculture regulations; and

Fourth, the value of the food stamps had a value of $100 or more.

The following chart references the date of each alleged act of food stamp fraud for Counts 4-12. You may refer to this chart during your deliberations.

Count	Date	EBT Card Number	Amount of Food Stamp Coupons Presented
4	October 7, 2008	XXXXXXXXXXXX5176	$398.00
5	October 7, 2008	XXXXXXXXXXXX5077	$129.19
6	October 9, 2008	XXXXXXXXXXXX5168	$193.00
7	October 9, 2008	XXXXXXXXXXXX5267	$211.00
8	June 11, 2009	XXXXXXXXXXXX3720	$500.00
9	June 18, 2009	XXXXXXXXXXXX7268	$300.00
10	June 18, 2009	XXXXXXXXXXXX3738	$500.00
11	June 3, 2010	XXXXXXXXXXXX3720	$300.22
12	June 3, 2010	XXXXXXXXXXXX7284	$300.25

Fifth Circuit Model Instruction No. 2.01 (modified from 7 U.S.C. § 2024(b)); *United States v. Abdelazz*, No. 02-21042-CR-DMM, Dkt. No. 71, Government's Proposed Instruction No. 17 (modified).

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 25

Food stamp benefits may be used by recipients only to purchase eligible food. Food stamp benefits may not be redeemed or traded for cash.

7 C.F.R. § 278.2(a); 7 C.F.R. § 274.7(a).

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 26

A defendant may be found guilty of wire fraud or food stamp fraud, even if the defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To prove a defendant guilty of aiding and abetting, the government must prove beyond a reasonable doubt:

First, the crime was committed by someone;

Second, the defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit each element of the crime; and

Third, the defendant acted before the crime was completed. It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit the crime.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

Ninth Circuit Model Instruction 5.1.

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 27

When you begin your deliberations, elect one member of the jury as your foreperson who will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Ninth Circuit Model Instruction 7.1.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 28

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or other feature. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.

Ninth Circuit Model Instruction 7.2.

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 29

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Ninth Circuit Model Instruction 7.3.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 30

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

Ninth Circuit Model Instruction 7.4.

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700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 31

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your foreperson should complete the verdict form according to your deliberations, sign and date it, and advise the clerk that you are ready to return to the courtroom.

Ninth Circuit Model Instruction 7.5.

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Seattle, Washington 98101-1271
(206) 553-7970

PROPOSED INSTRUCTION NO. 32

If it becomes necessary during your deliberations to communicate with me, you may send a note through the clerk, signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will respond to the jury concerning the case only in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, on any question submitted to you, including the question of the guilt of the defendant, until after you have reached a unanimous verdict or have been discharged.

Ninth Circuit Model Instruction 7.6.

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via telefax.

s/ *Lisa Royack*
LISA ROYACK
Legal Assistant
United States Attorney's Office
1201 Pacific Avenue, Suite 700
Tacoma, Washington 98402
Telephone: (253) 428-3813
Fax: (253) 428-3826
E-mail: Lisa.Royack@usdoj.gov